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Supreme Court of the United States

October Term 1952

No. 381

AMERICAN PRESIDENT LINES, LIMITED, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice, United States of America, et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable, The Supreme Court of the United States of America:

Now comes petitioner and requests a rehearing of the order denying motion for a writ of certiorari in the above-entitled cause, and as grounds for rehearing says:

The original petition was denied while the reply brief was being printed. No claim is made as to any impropriety in this circumstance but the fact remains that the points in respondent's brief stood unanswered at the time the Supreme Court of the United States took action.

Petitioner fears it had not adequately expressed the real importance to the general public and to the Judicial

Process itself which lies hidden in this case, and proposes to amplify its showing in this petition for rehearing.

The Administrative Procedure Act is a remedial law of vast importance to everyone in the United States. Clear and timely clarifications of its meaning by the Supreme Court is essential if we are to give any consideration to the correction of the evils this legislation was designed to cure.

While it is true that a denial of a petition for certiorari is not an affirmance of the ruling below, it definitely affects administrative agencies and is used as an affirmance as far as they are concerned. It is this effect of the denial and not its technical legalistic significance which touches the flesh of the citizen. The citizen who is injured gets small consolation from the knowledge that his injury was not legalistically justified.

The three points made by Respondent in its brief are specious.

First Point:

The Administrative Procedure Act does not confer direct review jurisdiction on the U. S. Court of Appeals for the District of Columbia.

Second Point:

A review proceeding is an original suit.

Third Point:

There is no conflict in the Circuits.

Petitioner will reply seriatim.

RESPONDENT'S FIRST POINT

"Courts of Appeal have no original jurisdiction except that specifically conferred by statute."

We accept this general proposition, but respectfully contend that the Administrative Procedure Act (Ch. 324,

§§ 1-12, 60 Stat. 237; 5 U.S.C.A. §§ 1001-1011) does specifically confer that jurisdiction when it gives a party aggrieved by administrative action a right of review by "any applicable form of legal action" in "any court of competent jurisdiction." A petition for a review is an applicable form of legal action. An appellate court is a court of competent jurisdiction to hear and decide appellate proceedings and a review proceeding is a form of appellate procedure. It is doing it every day, in similar review proceedings from similar administrative agencies. A statute which confers a right to an action in any court of competent jurisdiction confers on any court of competent jurisdiction the jurisdiction to hear and decide the matter. Otherwise, the right of action is illusory.

Jurisdiction is granted specifically in many specific statutes referring to the subject matter with which the particular administrative agency is concerned.

The Administrative Procedure Act (supra) is a general remedial act designed to afford every party aggrieved a judicial review in *every* case where such a review is lacking. It can't do so without conferring jurisdiction on courts of competent jurisdiction to pass on such reviews. It has used appropriate words to confer such jurisdiction. In effect Congress said:

(1) If a review is prohibited by statute, we will not disturb that prohibition.

(2) If there is a specific statutory review procedure already provided, a party aggrieved must pursue that procedure, if it is adequate.

(3) If no review is provided for now, the party aggrieved may pursue *any applicable form of legal action* in *any court of competent jurisdiction.*

There is the *specific statutory grant of jurisdiction* to all courts of competent jurisdiction, including the U. S.

Court of Appeals for the District of Columbia. The words are general and all-inclusive. A court cannot reasonably avoid inclusion in that context by saying, "Congress didn't call us by name."

Congress didn't call any court by name. It conferred jurisdiction on *all* courts of competent jurisdiction. The U. S. Court of Appeals for the District of Columbia is a segment of the totality referred to in the Statute.

A review procedure in a court of law is a form of legal action. It is an *applicable form*, since it is the usual form of legal action instituted to secure review in the vast majority of similar cases involving judicial reviews of final agency action.

When one considers the purpose of the Administrative Procedure Act (supra), and reads its legislative history, it should be clear that the words used were all-inclusive and gave a party aggrieved, who lacked a remedy under prior law, his choice of remedies and his choice of courts. Only two restrictions are noted: (1) Review must not be prohibited by existing law. (2) The type of legal action chosen must be applicable to the relief sought.

Respondent would have us believe that Congress had in mind only the precise forms of legal action permitted in Common law, probably before the Statute of Westminster II, with its "consimili casu" clause, because if we implement the spirit of that medieval statute, we would have our relief in the U. S. Court of Appeals for the District of Columbia where the vast majority of "similar cases" involving judicial review are heard and decided today.

Respondent would also have us believe that by the use of the words *"any form of legal action"* Congress did not include appellate forms of legal action and that the broad term *"any court of competent jurisdiction"* means: "The U. S. District Court for the District of Columbia."

To so hold would not be an act of interpretation of plain, unambiguous words. It would be substantive legislation in the form of judicial action and would, in effect, repeal the general terms of the Statute.

The words: "court of competent jurisdiction" should not give us any trouble.

They merely mean a court that has jurisdiction over the parties and the subject matter and has the power to act. Whether or not the U. S. Court of Appeals for the District of Columbia is such a court is the issue in this proceeding.

Its power to act or its lack of power to act must be decided here. Respondent seems to contend that we must look *outside* the Administrative Procedure Act (supra) for statutory extension of its jurisdiction. It is suggested that we try the U. S. District Court. However, we can't assume jurisdiction in the U. S. District Court, if "name-calling" is essential. It also is a statutory court and wasn't named in the Administrative Procedure Act (supra) either. The same argument which disqualifies the U. S. Court of Appeals disqualifies the U. S. District Court. Petitioner contends that the Administrative Procedure Act (supra), *itself* grants the authority by the necessary connotation of the words it uses.

To repeat: A law which confers a right of legal action to a party aggrieved in any court of competent jurisdiction must confer on every court of competent jurisdiction the jurisdiction to hear and decide that legal action.

All the party aggrieved must do is select one of several forms of action available. If he selects an original action, then the court of competent jurisdiction is a court of original jurisdiction.

If he selects an appellate form of legal action, then an appellate court is a court of competent jurisdiction.

The subject matter of the Section involved is Judicial Review, an appellate procedure. It is pure innovation to hold that Congress was referring only to original actions.

RESPONDENT'S SECOND POINT

Respondent's second point is that a review proceeding is an original action.

Singularly enough, Respondent quotes as authority *Blackmar* v. *Guerre*, 342 U.S. 512; 96 L. ed. 315, 316, where the Supreme Court of the United States holds the direct opposite. Either the writer of Respondent's brief didn't read that case, or cynically assumed that the Justices of the Supreme Court of the United States would not do so, because one could scarcely conceive of a case in greater conflict with the assertion it is pretended to support.

The case involved the right to the review of an agency action granted in the Hatch Act. (53 Stat. 1147; 5 U.S. C.A. 118 k (c))

An original action was brought, not a review proceeding. The Supreme Court held that the statute provided for a review proceeding, not an original action, and proceeded to point out the distinction between the two forms of legal action, stating that the statute provided for a *review*, not a "new proceeding," and that a review was "the continuation of the same proceeding before another tribunal."

The construction sought by the Respondent is as narrow as a profile. It requires the insertion of the word "original" in a statute in which the word doesn't appear. It constitutes an arrogant bid to continue as far as possible the evils which shocked the Congress into granting citizens general relief where relief was then lacking.

The Court of Appeals for the District of Columbia has fallen in line in the attempt to whittle away the relief granted by Congress to citizens in this remedial statute.

To hold that the words *"any* applicable form of legal action" means "a particular form of legal action," or that the words "any court of competent jurisdiction" means "the U. S. District Court for the District of Columbia" is not the result of ignorance or stupidity, and Petitioner charges the learned court with neither. It involves deliberate and willful distortion of words and a resulting change in the law. This is not the "interstitial growth" which the late Justice Holmes referred to in explanation of "judicial legislation," nor is it "filling the gaps" in the law, as the late Justice Cardozo characterized the same function. This is broad substantive legislation, designed to narrow the broad provisions of a remedial statute, and to deprive citizens of recourse to speedy judicial remedies when their rights have been invaded.

Mr. Justice Jackson defined a Soviet Court as "an arm of executive power." This has never been the glory of an American court. But when courts blindly follow the executive line, and when the fruits of the judicial process begin to fall into a foreign pattern, it is time for a vigorous and patriotic protest. It was the executive branch of the government which urged this construction upon the Fifth Circuit and upon the U. S. Court of Appeals for the District of Columbia. When our courts resort to distortion at the behest of administrative agencies and in aid of administrative aggression, the time for niceties in terms of remonstrance has passed. Courts can defy the Constitution just as effectively as the Congress. The Courts control Congressional usurpation of power, but there is no legal institution in our government to control the Courts, when the highest Court has spoken. There is, however, a power of resistance reserved to the people

by the Constitution, and it is as one of the people, an infinitesimal segment of the sovereign, that this protesting voice is now raised.

RESPONDENT'S THIRD POINT

Petitioner contends there is a conflict between the ruling in the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Third Circuit. Respondent disagrees.

The Fifth Circuit held that Section 10 of the Administrative Procedure Act (supra) did not deal with appellate procedures but dealt only with original actions. *City of Dallas, Texas* v. *Rentzel,* 172 F. 2d. 122; (C.C.A. 5), certiorari denied, 338 U. S. 858.

The Supreme Court has held that a review proceeding was not an original action, but was the continuation of the same proceeding before another tribunal, an appellate procedure. *Blackmar* v. *Guerre,* 342 U. S. 512; 96 L. ed. 315, 316.

The Third Circuit entertained a Petition for Review under the provisions of Section 10 of the Administrative Procedure Act (supra) and held it to be an *appropriate form of relief. United States* v. *Carusi,* 166 F. 2d. 457.

Thus we have the U. S. Supreme Court holding that a Review is an appellate procedure;

The Fifth Circuit holding that appellate procedures are not available;

The Third Circuit holding that appellate procedures are available.

No more direct conflict can be imagined.

Respondent construes the *Carusi* case (supra) as non-conflicting by stating it was an action brought in the

District Court. But this is a specious argument. There is no conflict, it is true, as to the forum.

The conflict is in the availability of the Form of Action. i.e. whether an appellate or an original form of procedure was available. The two Circuits are in direct conflict in this regard.

In the *Carusi* case (supra), the question as to whether the Review Proceeding would have been available by direct petition to the U. S. Court of Appeals for the Third Circuit was not raised.

IS AN UNNECESSARY TRIAL TO BE ENFORCED

The Supreme Court of the United States has in the past been interested in saving litigants from the useless waste of time and effort which would be expended in an unnecessary trial. *The Matter of Skinner & Eddy Corporation*, 265 U. S. 86; 68 L. ed. 912, is a case in point. In that case, the Court of Claims vacated a previously granted order of dismissal which had been entered at the request of the plaintiff. Normally, this would have brought the matter to a trial and after trial, on appeal, the question of the error of the Court of Claims in vacating its order of dismissal could have been reviewed and corrected in the Supreme Court.

The plaintiff brought a mandamus proceeding in the Supreme Court. Normally, mandamus will not lie if an appeal is possible. The Supreme Court noted that the pure question of law as to whether or not the right of a plaintiff to a dismissal was absolute could be decided in the mandamus proceeding and did so decide it, stating: "It would be a useless waste of time and effort to enforce a trial in the court of claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated."

On principle, the same matter is involved in these proceedings. The question is purely one of law. Why should we be forced to the "useless waste of time and effort" in order to bring the same legal issue to the same appellate tribunal which had the matter before it originally.

The heart of the question is merely this.

The Law: Defines "alien" so as to *exclude* U. S. citizens and nationals.

The Rule Complained of: Defines "alien" so as to *include U. S.* citizens and nationals.

Are these definitions harmonious or conflicting?

Does a definition which excludes citizens conflict with a definition which includes them?

That is the pure question of law to be decided. Should the U. S. Court of Appeals decide the question or should it dodge jurisdiction by construing the word *"original* action" into a statute which doesn't use the term at all, like the Fifth Circuit did, and thus impose upon a party aggrieved "the useless waste of time and effort to enforce a trial" in an original action.

In this case, all the facts necessary for a decision of the matter on its merits was before the U. S. Court of Appeals.

The Petition set forth the procedure and the Rules complained of. No procedural deficiency was alleged. The rule was alleged to be in conflict with the law. The rules were set forth in toto. There remained merely the judicial function of deciding a question of law. If the rule was in harmony with the Statute, the court could so find and validate the rule. If the rule was in conflict with the Statute, the court could so find and nullify it.

Where under these circumstances is the use of a trial in an original action? There are no facts to find. Expense, effort and delay are the inevitable result. Were these the ends sought by Congress when it enacted the Administrative Procedure Act (supra)? If not, why distort the Statute to produce such results. Why not interpret it so as to give effect to the remedy Congress enacted to correct the whilom vices in the law.

Was the statute designed to make Review easier or more cumbersome?

Was it the design of Congress to make Review more expensive by interposing a trial when no issue of fact existed?

Was Congress interested in withholding judicial relief or in granting it?

Was Congress trying to make it difficult on the citizen by putting unnecessary obstacles in his way, or was Congress interested in speeding up review processes and giving the citizen new relief which had theretofore been unavailable?

The words of the Statute are plain. The party aggrieved in the case of the absence or inadequacy of present remedies in existing law can choose his remedy and choose the court to fit the pattern of his remedy.

That is the only meaning which can be given the plain words: "any applicable form of legal action" in "any court of competent jurisdiction."

The Fifth Circuit read into those words a plain innovation. Its construction amended the statute by adding a term which was not enacted. It said the words "any applicable form of legal action" dealt "not with appellate review but with review by an original action in a court of competent jurisdiction."

Yet the very words "review" connote appellate procedure, not original action. It is the statutory review pro-

ceedings which constitute the mainstream of litigation involving relief from erroneous administrative action. Where in the Statute or in the evils it was enacted to correct can we find justification for a construction which dams up the mainstream of relief given citizens in similar statutes involving similar agency actions, and imposes a lesser and more circuitous method for judicial review of agency action where no relief was possible in prior law? The Statute was designed to give judicial review to those who lacked it. It didn't propose to give the present victims partial, diluted, and more cumbersome relief.

The climate of the legislation and the wording of the act are directly opposed to such construction. The heart of the Statute on the subject of judicial review is like that of criminal law. What is not prohibited is permitted. A party aggrieved in an agency action must first see if judicial review is prohibited. If not, he must next see if the method of review is provided for by pre-existing law, and is adequate. If so, he must pursue that method. If not, the world is his. He may select any kind of applicable legal action in any court of competent jurisdiction.

When the Statute specifically gave examples such as declaratory relief and various writs of mandatory and prohibitory injunction, it was not limiting the universality of its language. On the contrary, it was pointing out that under the term "any form of legal action" it was including collateral attack to review proceedings so as to give a choice and make the whole body of adjective law available. Adequacy of remedy was the obvious goal of the Statute. The words used gave scope to the subject of relief and did not restrict it. There is no hint of an intent to return to the formal writ system of the old Common Law.

It is apparent from the words used that Congress intended both original actions and review proceedings.

It headed the section by the words "Judicial Review." One of the most controversial sections involved the question of how far the court was bound by administrative findings. The reading of "the whole record" and the abrogation of the "scintilla rule" which are of the essence of the enactment are inapplicable provisions if only original actions were in contemplation. These terms are only applicable to "appellate procedure."

Where in the language used are we justified in holding that the Statute sought less relief, in judicial review proceedings as to matters where judicial review was not available under existing law, than was given in cases where judicial review was already permitted under existing law?

The words of the Statute connote the exact opposite. Reviews in existing procedures were continued unchanged and were to be followed, if adequate. Agency action for which no judicial review was provided in existing law and where review was not prohibited was given the all-inclusive choice of "any applicable form of legal action in any court of competent jurisdiction." This was a larger grant than was presently available in any review proceeding. Direct attack, collateral attack, original and appellate writs and appellate review procedures known to the law in similar cases now became available. The party aggrieved could pick and choose. There were only two restrictions. His choice of remedy must be applicable to the relief he sought. His choice of court must be one of competent jurisdiction to hear and decide the type of legal action he chose to present.

Petitioner most respectfully urges the Supreme Court of the United States to construe the Administrative Procedure Act (supra) in accordance with its own pronounce-

ments as to how that Act should be construed. Relevant statements are to be found in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33; 94 L. ed. 616:

> "But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it aimed at appear."
>
> • • • •
>
> "Such were the evils found by disinterested and competent students. Such were the facts before Congress which gave impetus to the demand for the reform which this Act was intended to accomplish. It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate so far as its text permits the practices it condemns."

With interpretation under such liberal standards and with so positive a recognition by the Supreme Court of the United States of its obligation under the Administrative Procedure Act (supra), Petitioner respectfully asks that the construction sought in these proceedings be declared to be the law of the land. Appropriate relief will then inevitably follow.

CONCLUSION

Because: There is great public necessity for full clarification of the provisions of the Administrative Procedure Act relating to Judicial Review;

Because: Present interpretations in the Circuits are so narrow as to nullify the broad provisions of that remedial legislation;

Because: There is conflict in the Circuits as to whether review procedure and not mere collateral attack is available in cases where no review was possible under prior law;

This case presents all the elements necessary to justify the issuance of a writ of certiorari.

It is respectfully submitted that a rehearing be granted and that the writ issue.

AMERICAN PRESIDENT LINES, LIMITED
Petitioner

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Welburn Mayock

By WELBURN MAYOCK

W. S. Mayock

W. S. MAYOCK

Attorneys for Petitioner

DISTRICT OF COLUMBIA, SS:

W. S. MAYOCK, being first duly sworn, on oath certifies and says:

That he is one of the attorneys for petitioner in this cause; that he makes this certificate in compliance with Rule 33 of the rules of this court; that the foregoing petition for rehearing is presented in good faith and not for delay; that the foregoing petition for rehearing contains new matter not previously presented and in his judgment is well founded.

W. S. Mayock

Subscribed and sworn to before me at Washington, District of Columbia, this 18th day of December, 1952.

(SEAL)

/s/ Raymond Goldberg

Notary Public in and for the
District of Columbia